90-960

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. CATHEY and BETTE CATHEY,
Petitioners

V.

THE DOW CHEMICAL COMPANY MEDICAL CARE PROGRAM,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK L. KINCAID
Counsel of Record
JOE K. LONGLEY

LONGLEY & MAXWELL
P. O. Box 12667
Capitol Station
Austin, Texas 78711
(512) 477-4444

Counsel for Petitioners

Of Counsel:

JOHN PATTERSON
JAMES W. PATTERSON

PATTERSON & PATTERSON
1314 Texas Avenue
Suite 613
Houston, Texas 77002
(713) 224-3813

December 12, 1990

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

In two related suits, one in state court and the other in federal court, James and Bette Cathey have asserted claims for health insurance benefits to pay for physician-prescribed, around the clock, skilled nursing care medically required because of Mrs. Cathey's crippling affliction, multiple sclerosis. The state courts held that all of the Catheys' claims are preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), including claims brought under provisions of the Texas Insurance Code that regulate and prohibit unfair insurance practices. Left with no state law protection, the Catheys sought relief in federal court pursuant to ERISA. The court of appeals, disregarding — indeed not even mentioning — universally accepted principles of contract construction, construed the plan so as to disallow these benefits. The result is no relief. All state law remedies are displaced, and the federal courts refuse to provide meaningful relief under ERISA. The question directly presented in this case is:

1. Can a federal court deny a claim for health care benefits under an ERISA-regulated plan that otherwise would be payable under universally accepted principles of contract interpretation, and do so *sua sponte* by adopting a construction never relied on by the Plan to justify the claim denial, without repudiating this Court's mandate to develop a federal common law of rights and obligations under ERISA-regulated plans to protect contractually defined benefits?

The importance of this issue is augmented by the complete preemption of any state law claims under statutes regulating unfair insurance practices. The state court appeal poses the following question that should be consolidated for review:

2. Can ERISA preempt a state law regulating unfair insurance practices that was enacted pursuant to the McCarran-Ferguson Act, notwithstanding the language of the "saving clause" in 29 U.S.C. § 1144(b)(2)(A) that explicitly saves from preemption "any law of any State which regulates insurance"?

LIST OF PARTIES

The names of all parties to this proceeding appear in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

CASE **Page**

TABLE OF AUTHORITIES (continued)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

JAMES C. CATHEY and BETTE CATHEY,
Petitioners

V.

THE DOW CHEMICAL COMPANY
MEDICAL CARE PROGRAM,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, James C. Cathey and Bette Cathey, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, rendered on August 3, 1990.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 907 F.2d, 554, and is reprinted in the Appendix at A-12.

The unreported findings of fact and conclusions of law, and the judgment of the United States District Court for the Southern District of Texas, Houston Division, are reprinted in the Appendix at A-29 and A-36, respectively.

The opinion of the Texas Court of Appeals in the related state court case is reported in *Cathey v. Metropolitan Life Insurance Co.*, 764 S.W.2d 286 (Tex.App.—Houston [14th Dist.] 1988, writ granted), and is reprinted in the Appendix at A-37.

The order of the Texas Supreme Court granting

review in the state court appeal is reported at 33 Tex. Sup. Ct. J. 41 (Oct. 18, 1989), and is reprinted in the Appendix at A-49 to 51.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was signed August 3, 1990, and the timely petition for rehearing filed by the Catheys was denied on September 13, 1990. (App. A-54). The jurisdiction of this Court to review the judgment of Fifth Circuit is invoked under 28 U.S.C. § 1254.[1]

STATUTES INVOLVED

The statutory provisions involved are lengthy. Accordingly, they are reproduced in the Appendix. Their citations are as follows: (1) Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461; (2) McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15; (3) Texas Insurance Code, art. 21.21 (Vernon Supp. 1990); (4) Texas Deceptive Trade Practices — Consumer Protective Act, Tex. Bus. & Com. Code Ann. § 17.50 (Vernon Supp. 1990); and (5) Texas State Board of Insurance Rules and Regulations, 28 Tex. Admin. Code §§ 21.1-.4, 21.201-.205 (West 1990).

STATEMENT OF THE CASE

A. Factual Background

James C. Cathey is a retiree from Dow Chemical Company. He and his wife, Bette Cathey, are covered by the Dow Chemical Company Medical Care Program (the Dow Program). The benefit plan is administered by Metropolitan Life Insurance Company.

Mrs. Cathey suffers from severe multiple sclerosis.

---

[1] A petition for a writ of certiorari in the related state court appeal, once the Texas Supreme Court rules, will invoke this Court's jurisdiction under 28 U.S.C. § 1257.

She is incapable of engaging in the simplest chores of self-care. She is subject to seizures, which requires constant monitoring and emergency intervention. (PX-11, 13). Bette Cathey's treating physician, Dr. Raymond Torp, described her as "grossly incapacitated." (PX-22). In 1981, Dr. Torp prescribed private duty, in-home nursing services for treatment of her condition. (PX-2, 3). In his opinion, these services were medically necessary "due to severe multiple sclerosis." (PX-4). Michael Maddolin, a claims consultant with Metropolitan, initially questioned whether the nursing services were "custodial," rather than "medically necessary." (App. A-62-63; PX-5). Dr. Torp confirmed that the nursing services were indeed medically necessary, writing: "She requires around the clock nursing care for management of her condition." (PX-6).

On October 26, 1982, Bette Cathey began receiving one eight-hour shift of private duty nursing care, performed by Mrs. Vlasta Jurek, a registered nurse, pursuant to Dr. Torp's orders.[2] (PX-8; Tr. vol. 3, 17). These services continued, and claims for benefits were paid by the Dow Program, for two and one-half years from 1982 until February 6, 1985.

In September 1983, Maddolin again questioned the need for the nursing services. (PX-8, 9). Nurse Jurek responded with a description of her nursing care, which included seeing that Bette Cathey got her special diet, medications, and occupational and physical therapy as ordered by Dr. Torp. Nurse Jurek's one page summary concluded: "I assist her physically and mentally to deal with this awful disease." (PX-10). Dr. Torp's response went into more detail, stating:

> Mrs. Jurek's duties include supervision of Mrs. Cathey's medical condition in addition to implementation of the orders as prescribed by the

---

[2] One eight-hour shift of services was provided, even though around the clock services were needed, because other nurses were not available. (Tr. Vol. 3, 146-47).

> physical and occupational therapists. Also, Mrs. Cathey is subject to seizures and if these should occur, Mrs. Jurek is instructed to institute standard seizure procedures.
>
> Mrs. Jurek is also instructed to monitor Mrs. Cathey's blood pressure and administer her medication as prescribed.

(PX-11).

When Maddolin later specifically asked whether Bette Cathey's care was "custodial," Dr. Torp replied: "No! She is receiving skilled nursing care!" (PX-12). This response led Maddolin to note that it was "OK to allow" continued payment since the nursing services involved "skilled care." Dr. Torp sent a follow-up letter stating:

> The above captioned patient has been under our care for the past several years. The services of round-the-clock nurses have been recommended for Mrs. Cathey.
>
> The nurses' duties would include supervision of Mrs. Cathey's medical condition in addition to implementation of orders as prescribed by the physical and occupational therapist. Also, Mrs. Cathey is subject to seizures and if these should occur the nurses have been instructed to institute standard seizure precautions.
>
> The nurses are further instructed to monitor Mrs. Cathey's blood pressure and administer her medications as prescribed. They have been advised to communicate with us periodically by letter and by phone regarding Mrs. Cathey's progress.
>
> * * *

PX-13).

The Catheys had been covered by the "Old Plan," which covered nursing services under the provisions for

"Supplemental Benefits." The relevant provision stated:

> Many health care needs are met through services performed by, or prescribed by, a physician. When this happens, your Supplemental Benefits help to cover the expense of such services as:
>
> * * *
>
> - Registered nurses.
>
> * * *

(App. A-55; PX-15, p. 7). Under the Old Plan, coverage for these services was subject to a $50,000 lifetime maximum. (App. A-56, PX-15, p. 8)

On December 11, 1984, James Cathey elected to change to the "New Plan." (PX-14). The Summary Plan Description, which outlined coverage under both the Old Plan and the New Plan, listed among the New Plan's benefits:

> *Personal Physician*: Many health care needs are met through services performed or prescribed by a physician. When this happens, the Plan will pay 80% of the reasonable and customary charges for such services as:
>
> * * *
>
> - Registered nurses.
>
> * * *

(App. A-60; PX-15, p. 14). Except for the 80% restriction, this language was identical to the coverage provision of the Old Plan under which the Dow Program had been paying for the nursing services. A significant difference was that the New Plan had a lifetime maximum benefit of $1 million. (App. A-58; PX-15, p. 13).[3]

---

3 In addition, the New Plan added the following provision:

On January 25, 1985, Maddolin recommended that payment be denied for all but three hours "attributed by Mrs. Jurek to physical, occupational and speech therapy." He admitted that "[s]killed nursing services to satisfy a medical need of the patient are covered," but added that "services by a nurse which are principally to assist with the personal needs of the patient such as preparing meals, feeding, bathing, help in getting into and out of bed, movements about the house, and companionship are not within the policy provisions." (App. A-64 to 65; PX-18). Because Maddolin did not address the other services being performed, Mr. Cathey asked Maddolin to refer to Dr. Torp's prior letters (PX-11, 13), which justified the medical need for Nurse Jurek's services. (PX-19).

On February 12, 1985, Maddolin broadened the denial, stating that Nurse Jurek was rendering "no medical treatment . . . other than custodial care." (App. A-66-67; PX-20). On that same day, Dr. Torp reaffirmed that Mrs. Cathey's condition required "around the clock nurses to provide skilled nursing care," that she was "grossly incapacitated," and that she needed the nursing services he had prescribed. (PX-22). On February 23, 1985, Mr. Cathey

---

(footnote 3 continued)

> *Home Health Care*: Home health care services are those provided to a covered person in his or her home after discharge from a hospital or convalescent care facility. Typical services available through approved home health care agencies — and eligible for Plan coverage — include those of registered nurses, licensed practical nurses, home health aides, and inhalation, physical, and speech therapists. However, expenses related to servides for housekeeping or custodial care are not covered by the Plan.
>
> * * *
>
> The Plan covers 100% of the *reasonable and customary* charges for a maximum of 50 home health care visits to any covered individual in any calendar year.
>
> (App. A-59 to 60).

requested that the nursing care be reinstated and that all future claims be honored. (PX-21).

By March 26, 1985, the Catheys hired an attorney who wrote to the Dow Program seeking reinstatement of the benefits that had been provided for one shift of nursing care and commencement of around the clock nursing as prescribed by Dr. Torp. (PX-27). The Dow Program responded on May 7, 1985, by denying all benefits for in-home private duty nursing care. App. A-73; PX-30)

B. Procedural History

After exhausting all administrative appeals, the Catheys filed suit in Texas state court against Metropolitan Life Insurance Company, Dow Chemical Company, and Metropolitan's claims adjuster, Michael Maddolin. The Catheys alleged various state law causes of action, including claims for unfair insurance practices in violation of article 21.21 of the Texas Insurance Code and the Texas Deceptive Trade Practices — Consumer Protection Act. The trial court granted summary judgment against the Catheys on all claims, including the ones based on Texas insurance laws, on the grounds that all were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a).

The Texas Court of Appeals affirmed. *Cathey v. Metropolitan Life Insurance Co.*, 764 S.W.2d 286 (Tex. App.—Houston [1st Dist.] 1988, writ granted) (App. A-37). The court held that certain of the statutory claims were initially "saved" under 29 U.S.C. § 1144(b)(2)(A) as 'laws regulating insurance," but were ultimately preempted by operation of the "deemer" clause of § 1144(b)(2)(B), even though the plan entity was not a party to that suit. 764 S.W.2d at 290-92.

The Texas Supreme Court granted the Catheys' application for review on the points alleging that the lower courts erred by holding the statutory claims under the

Texas Insurance Code were preempted by ERISA.[4] The case was argued on November 29, 1989, and is still pending.

While these proceedings were taking place, the Catheys filed a separate suit in state court under ERISA, 29 U.S.C. § 1132, against the Dow Chemical Company Medical Care Program. The Catheys sought reinstatement of benefits due, a declaration of their future right to benefits, and other relief. (Tr. vol. 2, p. 318). This suit was removed to federal court, based on federal question jurisdiction. (Tr. vol. 2, 311).

The district court held the claim denial was not arbitrary and capricious. The court alternatively held that even under a *de novo* standard of review, the denial was proper. (Tr. vol. 1, 18-19). The court agreed with the Dow Program that the nursing services ordered by Bette Cathey's doctor were "primarily custodial" and were therefore excluded from coverage. (App. A-32 to 33). The district court rendered judgment against the Catheys (App. A-36), from which they appealed to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit held that the proper standard of review was *de novo*, because the plan documents did not give the administrator discretionary authority to determine entitlement to benefits. (App. A-12). *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 558-60 (5th Cir. 1990). The Fifth Circuit also concluded that the district court erred by denying recovery for the portion of

---

[4] Coincidentally, the Texas Supreme Court granted review in *Cathey v. Metropolitan* the same day that court decided *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), which held that ERISA did not preempt an employee's claim for wrongful termination to interfere with vesting of pension benefits. This Court granted the petition for certiorari and reversed the judgment of the Texas Supreme Court. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. ____, 1990 WL 186257 (Dec. 3, 1990).

the claims that represented medically prescribed, non-custodial in-home nursing care. 907 F.2d at 561. The Catheys thus won in the Fifth Circuit on the only issues that were argued.

The Fifth Circuit then held, however, that any recovery by the Catheys for in-home skilled nursing services was governed *exclusively* by the "Home Health Care" language of the New Plan. 907 F.2d at 561. This holding drastically reduced the benefits available to Bette Cathey. The home health care provision limits coverage of in-home nursing services to fifty visits per year. (App. A-59 to 60). The Catheys had relied on the previously quoted New Plan language covering nursing services prescribed by a physician, which was limited only by the $1 million policy limit. (App. A-60 to 61).

The Fifth Circuit's construction was one never relied on or asserted by the Dow Program, and it was inconsistent with the Dow Program's own interpretation of the plan documents. The claim denial was based on the Dow Program's view that the nursing services were excluded as "custodial," and the case was tried, decided, and appealed on that theory.[5]

The Catheys urged on rehearing that the court erred by failing to adopt and apply a "federal common law of rights and responsibilities" to construe the plan provisions, as required by this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948, 954 (1989). The Catheys urged the court to reconsider its *sua sponte* revision of the plan documents and to construe the terms by developing federal common law principles that would be consistent with universally accepted rules of contract law.

The Fifth Circuit declined, without analysis or

---

5 *See* Tr. vol. 1, p. 192 (defendant's Pretrial Order); Tr. vol. 3, p. 17 (trial court states: "The question that's being decided in this case, that will be decided is whether or not your services were custodial . . ."); *id.*, at 22; *id.*, at 123, 126, 128, 131, 132 (defendant's counsel states coverage issue was whether services were custodial).

explanation, to articulate any federal common law principles that would justify or explain its holding, declined to explain its failure to develop and apply any such principles, and failed to explain its departure from established principles of contract law.

REASONS FOR GRANTING THE WRIT

I. *Overview*

This case once again confronts the Court with issues arising under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. Congress culminated years of study and effort by enacting ERISA. This Court has recognized that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' . . . and 'to protect contractually defined benefits.' " *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948, 955 (1988) (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), and *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)); *see also* 29 U.S.C. § 1001(b).

ERISA broadly preempts all state laws that "relate to" an employee benefit plan. This preemption provision is substantially qualified by the "saving clause," which exempts from preemption state laws that regulate insurance, banking, or securities. In turn, the saving clause is qualified by the "deemer clause," which effectively provides that an employee benefit plan itself, with certain exceptions, cannot be subjected to regulation by the state laws that are saved from preemption. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 733 (1985).

This case indirectly presents the question of the preemptive scope of ERISA as applied to state laws regulating unfair insurance practices and directly raises the issue of the obligation of courts to develop federal common law principles for reviewing benefit determinations under plans governed by ERISA. Both issues impact the "well-being and security of millions of employees and their dependents [who] are directly affected by these plans," and

for whose benefit ERISA was enacted. *See* 29 U.S.C. § 1001(a), (c).

The preemption question is significant because the state courts held that the Catheys had no remedy except what could be found in ERISA. When the Catheys sought their remedies under ERISA in federal court, the Fifth Circuit denied them any meaningful relief, by wholly failing to develop, articulate, or apply any federal common law principles to govern its review, and by limiting the benefits recoverable by the Catheys, based on a construction of the plan documents that could not exist under otherwise established principles of contract law. The result is a complete denial of relief; state law remedies are preempted, and a federal remedy is illusory.

Because of the relationship between these issues, the Catheys respectfully submit that this case is proper for consolidation for review with the decision of the Texas Supreme Court in *Cathey v. Metropolitan Life Ins. Co.*, 764 S.W.2d 286 (Tex. App.—Houston [1st Dist.] 1988, writ granted), when that decision is made. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 722, 739 n. 15 (1985) (appeals that presented complementary, interrelated issues of ERISA preemption consolidated for review).

II. *The Fifth Circuit erred by failing to adopt and apply federal common law principles under ERISA to determine the correctness of the denial of the Catheys' claim for benefits.*

Because ERISA is so sweepingly preemptive, it is essential that the remedies ERISA provides offer meaningful protection. *See Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989). Otherwise, all that ERISA preemption accomplishes is creation of a vacuum in which employers, plan administrators, and insurers are left unregulated and may act with impunity. Such a result is contrary to Congress's express intent in enacting ERISA.

Congress recognized the need for federal courts to

develop a body of federal common law to determine rights and liabilities under ERISA. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n. 26 (1983). This Court has emphasized that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948, 954 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).

The decision in *Firestone v. Bruch* shows how this federal common law development is supposed to work. To decide the issue of the appropriate standard of judicial review of benefit determinations by plan administrators under ERISA, the Court adopted and applied established principles of trust law, relying on its own prior common law decisions, treatises, and other secondary authorities such as the *Restatement (Second) of Trusts* (1959). One of the common law principles embraced, which is relevant to this case, was that the terms of the agreement are determined by the provisions of the instrument as interpreted in light of all the circumstances and other admissible evidence of intent. 109 S.Ct. at 955.

The Court specifically referred to common law contract principles established prior to the enactment of ERISA, stating:

> Actions challenging an employer's denial of benefits before enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim — by looking to the terms of the plan and other manifestations of the parties' intent.

109 S.Ct. at 955.

The Court also emphasized the Congressional intent to promote the interests of ERISA participants and their beneficiaries in employee benefit plans and to protect con-

tractually defined benefits. In light of these purposes, the Court was unwilling to adopt "a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." 109 S.Ct. at 956.

The Fifth Circuit's holding is at odds with the declaration in *Firestone* that ERISA was intended "to protect contractually defined benefits." 109 S.Ct. at 955 (quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)). Contractually defined benefits can hardly be protected if courts purport to construe and apply the contract provisions involved without reference to any accepted principles of contract construction. The Fifth Circuit failed to articulate or apply any principles of contract interpretation in reaching its decision. This failure continued despite the Catheys' timely petition for rehearing calling this point to the court's attention.

Other lower courts have followed *Firestone* and have begun to develop federal common law principles under ERISA. *See Wickman v. Northwestern National Ins. Co*, 908 F.2d 1077, 1084 (1st Cir. 1990) *cert. denied*, ____ U.S. ____ (1990); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 990 (4th Cir. 1990), *cert. denied*, ____ S. Ct. ____, 1990 WL 144068 (Nov. 26, 1990); *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990); *Arnold v. Life Ins. Co. of N. America*, 894 F.2d 1566, 1567 (11th Cir. 1990). Even the Fifth Circuit has recognized this obligation in other cases. *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989); *Hayden v. Texas - U.S. Chemical Co.*, 681 F.2d 1053, 1057 (5th Cir. 1982); *see also Morales v. Pan American Life Ins. Co.*, 914 F.2d 83, 87 (5th cir. 1990).

Unlike the Fifth Circuit in this case, other courts have looked to state law for guidance in developing federal common law principles under ERISA. *See McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d at 993; *Sargeant v. International Union of Operating Engineers, Local Union 478 Health Benefits & Ins. Fund*, 746 F. Supp. 241, 244

(D. Conn. 1990); *but see Harris v. Blue Cross & Blue Shield of Texas, Inc.*, 729 F. Supp. 49, 52 (N.D. Tex. 1990). The rationale for looking to state law approaches to interpreting insurance contracts is that state courts generally have had much more experience in the area. *Wickman*, 908 F.2d at 1084; *see also Schiller v. Mutual Benefit Life Ins. Co.*, 713 F. Supp. 1064, 1066 (E.D. Tenn. 1989).[6]

Lower courts have also resorted to treatises and other secondary authorities relevant to contract and insurance law, just as this Court did in *Firestone* with respect to trust law. *See Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 538-39 (9th Cir. 1990); *Wickman v. Northwestern National Ins. Co.*, 908 F.2d at 1085-86; *Provident Life v. Waller*, 906 F.2d at 993-94; *Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1285-86 (11th Cir.) *cert. denied*, 111 S. Ct. 232 (1990).[7]

It is only logical that, with respect to insurance benefit issues, the developing federal common law "must embody common-sense canons of contract interpretation." *Wickman v. Northwestern National Ins. Co.*, 908 F.2d at 1084 (quoting *Burnham v. Guardian Life Ins. Co. of America*, 873 F.2d 486, 489 (1st Cir. 1989)). Rules of construction that have been adopted under ERISA by other courts include: giving terms their plain meanings, meanings that comport with the interpretations given by the average person, *Wickman*, 908 F.2d at 1084; *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (9th Cir. 1990); *Burnham v. Guardian Life Ins.*, 873 F.2d at 490; liberal con-

---

6 The alternative of ignoring principles that have been developed by the state courts "invites federal lawsuits to reconsider every issue of insurance contract interpretation that has ever been litigated in the state courts." *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1442 (9th Cir. 1990) (Schroeder, J., dissenting in part).

7 Similarly, in their petition for rehearing, the Catheys asked the court of appeals to reconsider its erroneous construction of the plan documents, in light of common law contract principles recognized in prior Fifth Circuit decisions and in authorities such as the *Restatement (Second) of Contracts* (1981).

struction in favor of the policyholder or beneficiary, and strict construction against the insurer in order to afford the protection the insured endeavored to procure, *Wickman*, 908 F.2d at 1084; construing ambiguities against the insurer as drafter of the document, *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d at 538-39[8]; *Arnold v. Life Ins. Co. of N. America*, 894 F.2d at 1570 (Johnson, J., dissenting); and an insurer may be estopped in reference to the meaning of a contract term by its own interpretation of that term, *Kane v. Aetna Life Ins.*, 893 F.2d at 1286.

Although the issue in *Firestone* was different, the analysis applies. The present case presents the question of what standards apply when deciding whether the plan provides coverage for a claim, rather than the standard for

---

8 The rule of *contra proferentem*, requiring that insuring agreements be construed strictly against the drafter, was justified by the court as follows:

> . . . Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common lay person to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence. Moreover, once the policy language has been drafted, it is not usually subject to amendment by the insured, even if he sees an ambiguity; an insurer's practice of forcing the insured to guess and hope regarding the scope of coverage requires that any doubts be resolved in favor of the party who has been placed in such a predicament. Were we to promulgate a federal rule, we would find these common-sense rationales sound. Indeed, it would take a certain degree of arrogance to controvert an opinion held with such unanimity in the various states and to adopt a contrary view as the federal rule. We hold, therefore, that the rule of *contra proferentem* applies to the case at bar, regardless of whether it applies as a matter of uniform federal law or because federal law incorporates state law on this point.

910 F.2d at 540.

reviewing the claim decision.[9] This Court in *Firestone* recognized that "the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of the terms of the plan at issue." 109 S.Ct. at 956. This is such a case. The same type of common law principles turned to in *Firestone* and in cases following *Firestone* should have been used by the Fifth Circuit in this case. If the lower court had applied the most basic canons of contract interpretation, it could not have adopted the construction that it did. The following discussion will focus on the specific analysis employed by the court and will detail the analysis that should have been used.

For two years, from 1982 to 1984, the Dow Program paid for Nurse Jurek's daily eight-hour shift of nursing services under the Old Plan. The only provision of the Old Plan that covered private duty, bedside nursing was that which provided: "Many health care needs are met through services performed by, or prescribed by, a physician. When this happens, your Supplemental Benefits help to cover the expense of such services as: . . . Registered nurses." (App. A-55; PX-15, p. 7).

The New Plan, which the Catheys switched to in December 1984, contained a substantially identical provision, which provided: "*Personal Physician:* Many health care needs are met through services performed or prescribed by a physician. When this happens, the Plan will pay 80% of the reasonable and customary charges for such services as: . . . Registered nurses." (App. A-60; PX-15, p. 14). Except for the 80% restriction, this language was identical to the coverage provision of the Old Plan under which the Dow Program had been paying for the nursing services. A significant difference was that the New Plan had a lifetime

---

9 This distinction was also made in *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 541 (9th Cir. 1990), which distinguished between standards for reviewing a plan administrator's interpretation of plan provisions, and principles of construction according to which courts and administrators alike should arrive at their interpretations.

maximum benefit of $1 million. (App. A-58; PX-15, p. 13).[10]

The Fifth Circuit wrongly held that this language under the New Plan would not cover the registered nurse services prescribed by Bette Cathey's doctor. Instead, the court declared that the additional language of the Home Health Care provision was exclusive.

The starting point is the plain language of the contract. One rule of construction is to simply give the terms their plain meanings, meanings that comport with the interpretations given by an average person. *See Wickman*, 908 F.2d at 1084; *Evans v. Safeco*, 916 F.2d at 1441; *Burnham v. Guardian Life*, 873 F.2d at 490. It is undisputed that the Dow Program paid for nursing services under the coverage provision in the Old Plan. *See* 907 F.2d at 556. The Catheys reasonably understood that the same language in the New Plan would also provide coverage. The contract must be construed in a manner that protects this reasonable expectation. *See Wickman*, 908 F.2d at 1084; *Kunin v. Benefit Trust*, 910 F.2d at 538-39, 540.

The Fifth Circuit conceded that the nursing services were covered and all claims had been paid under the Old Plan. *See* 907 F.2d at 555. This coverage was acknowledged by Metropolitan on behalf of the Dow Program in a letter dated April 7, 1982, which stated: "The Dow Chemical Medical Benefit program provides benefits towards services rendered or prescribed by a licensed physician for the treatment of a sickness or injury when such services are medically necessary." (App. A-62). Because private duty, bedside nursing was covered by this language in the Old Plan, such services necessarily must also be covered by the same language in the New Plan. The Fifth Circuit's deci-

---

10 This difference explains the Catheys' decision to switch to the New Plan. Benefits under the Old Plan's $50,000 had been almost exhausted. This answers the Fifth Circuit's apparent confusion regarding the reason for the change. *See* 907 F.2d at 560.

sion is contrary to the plain language of the contract.

The Fifth Circuit's error followed from its incorrect view that the terms of the Old Plan were irrelevant when construing the terms of the New Plan. *See* 907 F.2d at 560. This suggests that there were two instruments, one for the Old Plan and one for the New Plan, but that is not the case. In fact, there was but one instrument relating to both plans.

When a court is attempting to construe a contract, the court must take into consideration the circumstances surrounding the formation of that contract. *Deauville Corp. v. Federated Department Stores, Inc.*, 756 F.2d 1183, 1193 (5th Cir. 1985) (applying Texas law); *Watkins v. Petro-Search, Inc.*, 689 F.2d 537, 538 (5th Cir. 1982) (same).[11] One of the important circumstances was that the provisions of the New Plan appeared only in the summary plan description that outlines the coverage of both the Old Plan and the New Plan. (App. A-55, 57; PX-15). When two contracts are so tied together, a court must consider them together in construing their language. *See Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154, 156 (5th Cir. 1982); *Lawrence v. United States*, 378 F.2d 452, 461 (5th Cir. 1967). It is necessary to consider the contracts together, because the existence of the two related contracts is one of the circumstances surrounding the making of the contract. *Richland Plantation Co.*, 671 F.2d at 156. The Fifth Circuit erred by treating the Old Plan and New Plan terms as entirely independent.

Another basic tenet of contract law that undermines the Fifth Circuit's holding is the rule that the parties' own interpretation of the contract language is considered the best evidence of what was intended and may be given con-

---

11 On this legal point and others to follow the Catheys cite decisions of the Fifth Circuit to emphasize the conflict with that court's own prior common law analysis, but scores of cases from this Court, other federal courts, and state courts could be cited in support of the same undisputed principles.

trolling weight. *See, e.g., Esso Int'l, Inc. v. SS Captain John*, 443 F.2d 1144, 1151 (5th Cir. 1971); *J. M. Huber Corp. v. Denman*, 367 F.2d 104, 109 (5th Cir. 1966). The reason the parties' interpretation is so important is that the goal is always to effectuate the intent of the parties; therefore, the court must put itself in the position of the parties, must take into account the parties' understanding of the contract language, and to the extent that the parties' intent was lawful the court must give effect to that intent. *Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 564 n. 3 (5th Cir. 1985); *City of Austin, Texas v. Decker Coal Co.*, 701 F.2d at 426; *Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 592 (5th Cir. 1980).[12] In this case, the Dow Program repeatedly paid for in-home, private duty nursing under language providing coverage for services prescribed by a physician. That course of dealing under the Old Plan establishes the interpretation that must be given to the same language under the New Plan.

In addition, when a court is trying to understand the language of a contract, the court must be guided by the subsequent conduct of the parties operating under that contract. *Esso Int'l*, 443 F.2d at 1151. In this case, after the Catheys switched to the New Plan, the Dow Program paid their claims for Nurse Jurek's services under the New Plan provision for registered nursing services prescribed by a physician, just as it had paid claims under the same language in the Old Plan. The Dow Program's subsequent conduct is consistent with the interpretation of the contract the Catheys proffer. Alternatively, the Dow Program's own interpretation of the contract estopped it to later assert that Bette Cathey's nursing services were exclusively covered by the home health care language. *See Kane v. Aetna Life Ins.*, 893 F.2d at 1286 (holding as a

---

12 Similarly, a course of dealing between the parties is also important when considering their intent, *Restatement (Second) of Contract* § 223, and when a contract involves repeated instances of performance, any course of performance adopted by the parties is given great weight in determining what the contract language means. *Restatement (Second) of Contracts* § 202(4).

matter of federal common law that insurer of ERISA plan was estopped by its own interpretation of contract term).

One of the key distinctions between the "Home Health Care" and "Personal Physician" provisions of the New Plan was that, while both expressly covered nursing services, the home health care section provided coverage at 100%, limited to fifty visits per year, while the personal physician language paid charges at 80%, with no fifty visit limit. In addition, once a preset out of pocket limit was reached, coverage under the latter provision would increase to 100%. (App. A-57 to 58). This 80% versus 100% distinction between the home health care and personal physician provisions provides one of the most compelling bits of evidence of how the New Plan was actually applied and understood by the Dow Program.

The only way nursing services would be covered at 80% under the New Plan was if they were paid under the "Personal Physician" language. Plaintiff's Exhibit 26 was a letter dated March 15, 1985, *after the Catheys switched to the New Plan*, in which the Dow Program wrote to James Cathey that the nursing services that had been covered at 80% would now be covered at 100% because he had reached his limit for "maximum out-of-pocket expense." (App. A-71). The language that is referred to for "maximum out-of-pocket expense" is found in the New Plan and relates solely to coverage that is otherwise provided *at 80%*, such as the "Personal Physician" provision. (App. A-57 to 58).

If the nursing services could only be covered under the home health care language, as the Fifth Circuit held, the Dow Program would have never initially paid those services at 80%, because the home health care provision gives coverage at 100%. If the in-home nursing services referred to in the letter had been covered under the home health care language instead of the personal physician language, there would have been no occasion to increase the benefits later under the "maximum out-of-pocket expense" language.

The Dow Program's own construction that in-home nursing services were covered under the language of the New Plan relating to services prescribed by a physician is of paramount importance because the highest evidence of a party's intent is that party's own construction of his language contained in a contract. *Mapco, Inc. v. Pioneer Corp.*, 615 F.2d 297, 301 (5th Cir. 1980). Moreover, given evidence showing that both parties to the contract interpreted it to cover nursing services under the provision relating to services prescribed by a physician, that construction must prevail. *See Restatement (Second) of Contracts* § 201(1). It was improper for the Fifth Circuit to construe the language in a manner that the parties themselves had neither intended nor imagined. *Burnham v. Guardian Life*, 873 F.2d at 489. A court is restricted to the interpretation of a contract that the parties made for themselves. *Lion Oil Co. v. Gulf Oil Corp.*, 181 F.2d 731, 733 (5th Cir. 1950).

The Dow Program never expressed any intention that the home health care provision would be the exclusive source of coverage for in-home nursing services. The correct understanding and interpretation of these provisions was outlined in a letter dated May 7, 1985, from the Dow Program's in-house attorney. (App. A-73; PX-30). That letter confirmed that both provisions covered in-home nursing services, subject to different restrictions. The attorney, speaking on behalf of the Dow Program and the plan administrator, stated:

> With respect to nursing services, the certificate will reflect the Plan intent that skilled nursing services that are not custodial care, provided by a Nurse other than a Nurse who lives in one's home or who is a member of one's immediate family may be a Covered Medical Expense with the covered percentage being 80% (unless otherwise reduced or excluded by other Plan provisions). Nursing care provided through a home health care agency may be covered at

> 100% (unless otherwise reduced in accordance with the other Plan provisions).

(App. A-74; PX 30). The Dow Program consistently viewed the language under the "Personal Physician" heading of the New Plan as covering in-home nursing services prescribed by a physician, just as the same language in the Old Plan had provided such coverage. The "Home Health Care" and "Personal Physician" provisions of the New Plan are clearly alternative provisions for in-home nursing services, each with different requirements.

It is an elementary rule of contract construction that contract language is construed against the drafter, in this case the Dow Program.[13] If it was the Dow Program's intent to make the home health care provision the exclusive source of coverage for private duty, bedside nursing, the Dow Program could have chosen language that clearly expressed that intent. Instead, the Dow Program simply added the home health care provision and kept intact the other language that had a covered Bette Cathey's nursing claims for over two years under the Old Plan. Any ambiguity must be construed against the Dow Plan as drafter of the contract. *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.d at 541.

Indeed, Bette Cathey's claim was not denied on the basis that the home health care provision provided the exclusive source for in-home nursing benefits, and this case was not tried on that theory. The Dow Program's argument at trial and throughout this case was that although services could be covered under the "Personal Physician" language if the services of a registered nurse were prescribed by a physician, the services in this case were excluded because they were primarily "custodial". (Tr. Vol. 3, 8).

---

[13] *See, e.g., Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d at 156; *Zapata Marine Services v. O/Y Finnlines, Ltd.*, 571 F.2d 208, 209 (5th Cir. 1978); *Restatement (Second) of Contracts* § 206. The same principle has been adopted in other ERISA cases as a rule of federal common law. *See Wickman v. Northwestern National Ins. Co.*, 908 F.2d at 1084; *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d at 538-39.

At trial, the court and the parties even discussed the difference between the "Home Health Care" provision and the "Personal Physician" language. The court asked for clarification of these provisions, and the Catheys' counsel explained that it was his understanding that the coverage under the Home Health Care language was already being provided. (Tr. vol. 3, 105-106). If the Fifth Circuit's view of the plan language was correct, that understanding should have ended the case. If Bette Cathey was already receiving fifty home health care visits per year, as stated by her counsel, under the Fifth Circuit's view of the plan language she would not be entitled to any more coverage, whether the nursing services were custodial or not.

The interpretation of the plan language as providing coverage for in-home nursing services under both provisions was never challenged by the Dow Program during the claim review process, and the Dow Program's counsel never offered at trial the interpretation the Fifth Circuit embraced. In this case, the court's opinion gives the New Plan a construction that is more favorable to the Dow Program than the Dow Program ever claimed for itself in its dealings with the Catheys. Basic considerations of contract interpretation favor the objective expressions of the parties, rather than any such judicial subjectivity. *Howell v. Union Producing Co.*, 392 F.2d 95, 114 (5th Cir. 1968). The objective manifestation of the intent of the Dow Program and the Catheys is that bedside nursing was covered under the Old Plan when prescribed by a physician and was covered under the same language of the New Plan.

The action of the court of appeals in this case establishes the principle that under ERISA contracts can be construed to deny benefits even though accepted rules of contract construction applicable under federal and state law in any other context would support recovery. The aberrant reading adopted by the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." *See* Sup. Ct. R. 10. The Catheys fur-

ther submit that the judgment of the court of appeals is at odds with the legislative intent of ERISA and this Court's holdings that courts are to develop a body of federal common law principles to review benefit determinations under plans governed by ERISA in order to protect ERISA beneficiaries and participants.

III. *The state courts erred in holding the Catheys' claims under the Texas Insurance Code were preempted by ERISA.*

The question of the scope of the preemption and saving clauses is not directly at issue in this case. The Catheys' claim for benefits from the plan clearly "relates to" the plan and thus invokes the preemption clause. *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1553 (1987). Moreover, any state insurance law remedies that are "saved" could not apply to the plan itself, because of the operation of the deemer clause. *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990) (slip op. at 6). Nevertheless, the overly broad preemption holdings of the state courts have an indirect impact, because the Catheys were left with only their federal remedies under ERISA as an avenue for relief, one which the federal courts failed to give effect.

As previously discussed, the preemption language of ERISA is broad, but this Court has recognized that the preemption clause is explicitly limited by the saving clause, which preserves any state law that "regulates insurance, banking, or securities." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739-40 (1985). This Court has had several opportunities to address the interplay of these provisions and has described their operation as follows:

> To summarize the pure mechanics of the provisions quoted above: If a state law 'relate[s] to . . . employee benefit plan[s],' it is preempted. § 514(a) [29 U.S.C. § 1144(a)]. The saving clause excepts from the preemption clause laws that 'regulat[e] insurance.' § 514(b)(2)(A) [§ 1144(b)(2)(A)]. The deemer clause makes clear that a state law that 'purport[s] to regulate insurance'

> cannot deem an employee benefit plan to be an insurance company. § 514(b)(2)(B) [§ 1144(b)(2)(B)].

Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. at 1552 (1987).

Although the preemption clause broadly preempts state law, the saving clause broadly preserves the states' lawmaking powers over much of the same regulation. *Metropolitan*, 471 U.S. at 739-40. The saving clause is entitled to no less weight than the preemption and deemer clauses. In fact, this Court recognized that the expansiveness of the preemption clause "gave the insurance saving clause a much more significant role, as a provision that saved an entire body of law from the sweeping general preemption clause." *Metropolitan*, 471 U.S. at 745 n. 23.

The saving clause maintains a century-old federal policy of leaving insurance regulation to the states. Initially, the view was that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 8 Wall. 168, 183 (1869), *quoted in, Securities & Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 458 (1968). "Consequently, regulation of insurance transactions was thought to rest exclusively with the States." *SEC v. National Securities*, 393 U.S. at 458.

In 1944, this Court upset the traditional view by holding, in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), that insurance transactions did affect commerce and were, therefore, subject to federal regulation. Congress reacted by passing the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, to make clear that "the continued regulation . . . by the several states of the business of insurance is in the public interest" and to preserve that regulation to the states.

The preemption issue involves the Catheys' state law claim arising under article 21.21 of the Texas Insurance Code. Texas regulates insurance practices through article 21.21 of the Texas Insurance Code, which prohibits unfair insurance practices relating to the sale of policies, competition between companies, relations between the insurers and

the insureds, and claims handling. The statute specifically provides that it was enacted pursuant to the authority preserved by Congress in the McCarran-Ferguson Act. Tex. Ins. Code Ann. art. 21.21, § 1.[14]

It is clear that the statute "regulates insurance," within the meaning of the ERISA saving clause. In *SEC v. National Securities,* this Court defined the "business of insurance" as follows:

> . . . Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies . . . and the licensing of companies and their agents . . . are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." *The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were the core of the "business of insurance."* Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. *But whatever the exact scope of the statutory term, it is clear where the focus was — it was on the relationship between the insurance company and the policyholder.* Statutes aimed at protecting or regulating this relationship are laws regulating

---

14 The relevant portions of article 21.21 are reprinted in the Appendix at A-8. The statute broadly prohibits unfair insurance practices and incorporates prohibitions of the Texas Deceptive Trade Practices—Consumer Protection Act and rules and regulations of the Texas State Board of Insurance. Examples of the incorporated provisions are reprinted at App. A-6 and A-8. For a detailed discussion of the application of Tex. Ins. Code article 21.21, see *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988).

the "business of insurance."

393 U.S. at 460 (emphasis added) (citations omitted). In *Metropolitan*, this Court expressly embraced this definition with respect to construing ERISA's saving clause. 471 U.S. at 743-44. Article 21.21 clearly regulates the relationship between the insurer and insured, and the enforcement of policies, and thus clearly regulates "the business of insurance."

The Texas court of appeals correctly held that article 21.21 was a law regulating insurance, within the scope of 29 U.S.C. § 1144(b)(2)(A). *Cathey v. Metropolitan*, 764 S.W.2d at 291. The problem with that court's analysis is that it held the deemer clause resulted in preemption of article 21.21, even in a suit that did not involve the plan entity. *Id.* This holding is clearly incorrect, in light of *Metropolitan v. Massachusetts* and the more recent decision in *FMC Corp. v. Holiday*, where this Court recognized that regulation of insurers is permissible by virtue of the saving clause, even though regulation of the plan itself would be prohibited by the deemer clause.

The argument is made, and some courts have held, that even though a statute may appear to regulate insurance, as article 21.21 does, it is nevertheless preempted under this Court's holding in *Pilot Life Ins. Co. v. Dedeaux*, because allowing an additional state law remedy for unfair claims handling would be inconsistent with the purpose of ERISA to establish a uniform federal remedy. *See Ramirez v. Inter-Continental Hotels*, 890 F.2d 760 (5th Cir. 1989); *McManus v. Travelers Health Network of Texas*, 724 F. Supp. 377 (W.D. Tex. 1990); *see also Kane v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 109 S. Ct 3216 (1989) (reaching same conclusion regarding California Insurance Code provisions). These cases are based on a misreading of *Pilot Life*. The Court's decision in *Pilot Life* must be read in the context of the facts at issue. That case dealt with a common law theory of general application, which was not a law regulating insurance that would be saved from preemption. 107 S. Ct. at 1555. All of

this Court's discussion regarding the need for uniformity in remedies must be read in that light.

To hold that a statute regulating insurance although explicitly saved by § 1144(b)(2)(A) is nevertheless preempted out of a concern over a congressional desire for uniformity would be to read the preemption clause so broadly as to ignore the saving clause. As this Court recently recognized:

> "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievements of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."

Pension Benefit Guaranty Corp. v. LTV Corp., 110 S. Ct. 2668, 2676 (1990). In this instance, Congress desired uniformity, as expressed by the preemption clause, but Congress itself set the limit by also enacting the saving clause. The lack of uniformity that results from saving state laws regulating insurance is a consequence Congress drafted into the statute in order to serve the countervailing interest of preserving traditional state insurance regulation.

The issue of ERISA preemption is not ripe for decision, because the Texas Supreme Court has not yet ruled. The point is raised so this Court can see the importance of the issue as a justification for granting certiorari in both this case and any petition resulting from the Texas Supreme Court's ultimate decision in the state court proceeding.

CONCLUSION

This case presents a clear, but not atypical, example of how ERISA has been perverted from its goal of protecting participants and beneficiaries. Courts have applied the preemption clause so broadly as to preempt even state laws

regulating insurance that were explicitly enacted pursuant to the McCarran-Ferguson Act, which left insurance regulation to the states. Once participants and beneficiaries are left without any state law remedies, the same courts show an inexplicable unwillingness to develop federal common law principles under ERISA to provide meaningful relief. ERISA has simply become a means for health insurers and employers to pick and choose which claims will be paid and which will be denied, without any effective regulation under either state or federal law. This is hardly what Congress intended. One judicial critic has written:

> The ERISA quicksand is fast swallowing up everything that steps in it or near it. This morass serves as the stage for a theater of the absurd.

Jordan v. Reliable Life Ins. Co., 694 F. Supp. 822, 827 (N.D. Ala. 1988). Later he added:

> There is a growing phalanx of courts expressing the fear that ERISA will continue to expand and to preempt everything in its meandering path. Only Congress or the Supreme Court can rescue us from the quicksand.

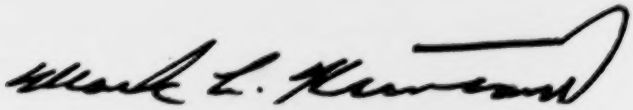
Id. at 835.

The Catheys respectfully pray that this Court will grant their petition for certiorari to clarify the obligation of courts to develop meaningful common law principles to protect participants and beneficiaries under ERISA. Petitioners further ask the Court to consider consolidating this petition with any petition for certiorari in the related state court case once the Texas Supreme Court rules on the issue of ERISA preemption of state laws regulating insurance.

The Catheys respectfully submit that their state law claims should not have been preempted, because they were based on state laws within the saving clause of ERISA, 29 U.S.C. § 1144(b)(2)(A). Moreover, even if the Catheys' rights were governed solely by ERISA, the Fifth Circuit

erred by wholly abdicating its duty to develop and apply rational principles of federal common law to construe the plan terms at issue.

Respectfully submitted,



MARK L. KINCAID
Counsel of Record

JOE K. LONGLEY

LONGLEY & MAXWELL
P. O. Box 12667
Capital Station
Austin, Texas 78711
(512) 477-4444

Counsel for Petitioners